

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JASON SIGERS,

Plaintiff,

v.

Case No. 08-13298
Honorable Patrick J. Duggan

C/O BAILEY, P.A. UNKNOWN MEDICAL
STAFF AT PINE RIVER FACILITY, DR.
MISHRA, P.A. JUDY DAOUST, DR. TIEN,
and CORRECTIONAL MEDICAL
SERVICES, INC.,

Defendants.

**OPINION AND ORDER GRANTING MOTION TO DISMISS BY DEFENDANT
JUDY DAOUST, P.A. AND CORRECTIONAL MEDICAL SERVICES, INC.**

At a session of said Court, held in the U.S.
District Courthouse, Eastern District
of Michigan, on January 19, 2010.

PRESENT: THE HONORABLE PATRICK J. DUGGAN
U.S. DISTRICT COURT JUDGE

On July 21, 2008, Plaintiff filed this lawsuit pursuant to 42 U.S.C. § 1983, alleging that Defendants failed to protect him from an assault by other inmates and thereafter failed to provide him with adequate medical care. On March 26, 2009, Defendant Judy Daoust, P.A. (“P.A. Daoust”) and Correctional Medical Services, Inc. (“CMS”) filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). This Court had previously issued an order referring all pretrial matters in this lawsuit to Magistrate Judge Michael Hluchaniuk.

On December 9, 2009, Magistrate Judge Hluchaniuk issued a Report and Recommendation (R&R), recommending that this Court grant P.A. Daoust's and CMS' motion to dismiss. Magistrate Judge Hluchaniuk concludes that Plaintiff failed to exhaust his administrative remedies with respect to his claim against P.A. Daoust and that he fails to sufficiently identify a CMS policy, pattern, or practice to state a claim against CMS upon which relief may be granted. At the conclusion of the R&R, Magistrate Judge Hluchaniuk advises the parties that they may object and seek review of the R&R within fourteen days of service upon them. (R&R at 18.) He further specifically advises the parties that the "[f]ailure to file specific objections constitutes a waiver of any further right to appeal." (*Id.* (citations omitted).) Neither party filed objections to the R&R.

The Court has carefully reviewed the R&R. The Court concurs with the conclusions and recommendations reached by Magistrate Judge Hluchaniuk, except to the extent that he recommends dismissal of Plaintiff's claim against P.A. Daoust *with* prejudice. Because the Court is dismissing Plaintiff's claim against this defendant for failure to exhaust his administrative remedies, the dismissal should be without prejudice. *See Bell v. Konteh*, 450 F.3d 651, 654 (6th Cir. 2006) ("When a prisoner's complaint contains both exhausted and unexhausted claims, the unexhausted claims should be dismissed without prejudice while the exhausted claims are allowed to proceed.")¹

¹In the motion to dismiss, P.A. Daoust also argues that Plaintiff fails to allege facts sufficient to state a viable deliberate indifference claim in violation of the Eighth Amendment against her. If accepted, this is a basis to dismiss Plaintiff's claim against P.A. Daoust *with* prejudice. Magistrate Judge Hluchaniuk did not address this alternative argument for dismissal (continued...)

Accordingly,

IT IS ORDERED, that the motion to dismiss by P.A. Daoust and CMS is
GRANTED;

IT IS FURTHER ORDERED, that Plaintiff's claim against CMS (Count VI) is
DISMISSED WITH PREJUDICE, whereas his claim against P.A. Daoust (Count IV) is
DISMISSED WITHOUT PREJUDICE.

s/PATRICK J. DUGGAN
UNITED STATES DISTRICT JUDGE

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¹(...continued)
in his R&R. The Court, however, finds that Plaintiff alleges sufficient facts to state such a claim
in his amended complaint.